No. 16-1220

IN THE

Supreme Court of the United States

ANIMAL SCIENCE PRODUCTS, INC., *ET AL.*,

Petitioners,

—v.—

HEBEI WELCOME PHARMACEUTICAL CO. LTD., *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR RESPONDENTS

JONATHAN M. JACOBSON
Counsel of Record
DANIEL P. WEICK
JUSTIN A. COHEN
WILSON SONSINI GOODRICH & ROSATI, P.C.
1301 Avenue of the Americas, 40th Floor
New York, New York 10019
(212) 497-7700
jjacobson@wsgr.com

SCOTT A. SHER
BRADLEY T. TENNIS
WILSON SONSINI GOODRICH & ROSATI, P.C.
1700 K Street, N.W., Fifth Floor
Washington, D.C. 20006
(202) 973-8800

Attorneys for Respondents

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29, Hebei Welcome Pharmaceutical Co. Ltd. hereby discloses that North China Pharmaceutical Co. Ltd. is its parent company and no other publicly held corporation holds more than 10% of its stock. North China Pharmaceutical Group Corporation hereby discloses that it is a state-owned enterprise under the indirect ownership of the State-Owned Assets Supervision and Administration Commission ("SASAC") of the Hebei Province of the People's Republic of China, that Jizhong Energy Group Co., Ltd. (which is wholly owned by the SASAC) is its direct parent company, and that no publicly held corporation holds more than 10% of its stock.

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INTRODUCTION

The Second Circuit unanimously adopted the rule in this case that "when a foreign government, acting through counsel or otherwise, directly participates in U.S. court proceedings by providing a sworn evidentiary proffer regarding the construction and effect of its laws and regulations, which is reasonable under the circumstances presented, a U.S. court is bound to defer to those statements." Pet. App. 25a. The United States concedes that this articulation of the standard of deference to a foreign government's statement of its own law is "not necessarily [ ] problematic[.]" Br. of U.S. at 9. But it nevertheless recommends that this Court review the decision below because it quibbles with how the Second Circuit applied that standard. *Id.* at 9-13. Such a dispute over the application of a properly stated legal standard to the facts of this case does not create an issue worthy of this Court's review, and the petition for *certiorari* should therefore be denied, the United States' recommendation notwithstanding.[1]

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[1] Respondents agree with the United States that the first and third questions presented by the Petition do not merit review, and therefore do not address the United States' arguments on those points. Br. of U.S. at 13-22.

I. THE UNITED STATES OVERSTATES THE SECOND CIRCUIT'S NARROW HOLDING AND IGNORES THE SECOND CIRCUIT'S EXPLANATION FOR WHY EVIDENCE OUTSIDE OF THE CHINESE STATUTES AND REGULATIONS AT ISSUE AND THE MINISTRY'S EXPLANATION OF THEM WOULD NOT AID IN CONSTRUING THEM

1. The Second Circuit's holding quoted above provides for deference to the statement of a foreign government regarding the construction of its own law solely under the following conditions: 1) that the foreign government formally appear in the proceedings, 2) that the foreign government provide a sworn evidentiary proffer, and 3) that the construction given to the foreign government's law be reasonable under the circumstances. Pet. App. 25a. This standard does not require absolute deference to foreign sovereigns in all circumstances. A statement made outside of the U.S. court proceedings would not receive deference under this standard, nor would an unadorned assertion by the sovereign unsupported by any proffer of legal materials, nor would a statement that contradicted previous statements regarding the law at issue. Rather, the requirements adopted by the Second Circuit track the requirements imposed by this Court for an agency to receive deference for its legal interpretations: formal decision-making combined with an interpretation not inconsistent with the plain meaning of the legal provisions or otherwise unreasonable under the circumstances. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2142 (2016); *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001).

2. Viewed in this light, every statement made by the United States in Point I.A of its brief aligns with the holding below. *See* Br. of U.S. at 6-8. The court below expressly noted that Federal Rule of Civil Procedure 44.1 makes determination of foreign law a question of law and "provide[s] courts with a greater array of tools for understanding and interpreting [foreign] laws." Pet. App. 22a. It contemplates that foreign government statements may occur in a variety of contexts other than a formal appearance by the foreign government. *Id.* 24a-25a & 30a n.10. And it would not credit contradictory statements, statements that are "unclear or unsupported," or statements that "fail[] to address relevant authorities." Br. of U.S. at 8.

Indeed, to the extent that the United States' position is that any statement by a foreign government regarding the construction of its own laws should be evaluated by reference to "the statement's clarity, thoroughness, and support; its context and purpose; the authority of the entity making it; its consistency with past statements; and any other corroborating or contradictory evidence" (*id.*), it is difficult to divine what possible daylight would exist between the Second Circuit's position and that of the United States. The Second Circuit simply gives content to the standard by specifying what level of support is needed in the specific context of a formal appearance by the authorized agency of the foreign government (namely, a formal evidentiary proffer) and what standard the statement should be judged by in that specific context (reasonableness under the circumstances).

3. Because the standard articulated by the Second Circuit does not actually deviate from the general views expressed by the United States on the

proper level of deference to a foreign sovereign's statement of its own laws, the United States cannot find an issue worthy of this Court's review without inserting language into the Second Circuit's opinion. The United States contends that "[t]he totality of the court of appeals' opinion . . . indicates that it adopted and applied a far more deferential standard, under which a court is bound to accept a foreign government's characterization—and may not consider other material—unless that characterization is *facially* unreasonable." *Id.* at 9.

That overstates the Second Circuit's narrow holding. The Second Circuit limited conclusive deference to formal statements made before the court that are reasonable under the circumstances. Its finding that the Chinese government's proffer met those criteria does not meaningfully deviate from this Court's finding that a similar statement from the Commissariat of Justice of the Soviet Union merited similar deference in *United States v. Pink*, 315 U.S. 203 (1942). In this case, just as in *Pink*, the Second Circuit found that Ministry had the authority to officially interpret the regulations at issue, and the Second Circuit's finding of reasonableness indicates that the court found the statement complete and not contradicted by any other interpretation of the regulations at issue. Pet. App. 6a-10a & 27a-29a. The Second Circuit's approach thus completely matches the United States' reading of *Pink*, showing that this Court's existing guidance on the question of deference suffices for this case and cases like it. *See* Br. of U.S. at 10-11.

4. Moreover, the Second Circuit did in fact consider and reject the district court's reasoning about extrinsic evidence. *Cf. id.* at 9-10. In particular, it considered and rejected the district court's concerns

that 1) the vitamin C manufacturers may have petitioned the Chinese government to legally mandate the conduct at issue, 2) the laws may not have been rigorously enforced, and 3) that the laws may not have called for "the exact anticompetitive conduct alleged in the complaint[.]" Pet. App. 30a. The court rejected the first concern on the grounds that the reason why the Chinese government adopted the regulations does not determine what the regulations mean; found the second issue unpersuasive given that enforcement or lack of enforcement does not matter for purposes of determining what the regulations meant; and held that the specifics of the mandated prices do not undermine the threshold finding that "the PVC regime, on its face, required Defendants to violate U.S. antitrust laws in the first instance." *Id.* 31a-33a. The court below thus did not disregard matters outside of the Ministry's amicus brief so much as find that the matters raise did not tell the court anything useful about what the regulations at issue meant, let alone render the Ministry's interpretation of its own regulations unreasonable.

5. Other points identified by the United States would not justify a different outcome. The statement that compliance with the government's regulatory regime was accomplished "without any government intervention" (Br. of U.S. at 10) is not at all inconsistent with the Ministry's position in the district court and court of appeals. Directing the companies to come up with a price-fixing agreement that is "voluntary" in the sense that they all agree to it without the government specifying the price to be set *is* directing illegal price fixing. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224 n.59 (1940). Achieving joint agreement on price and output

is price fixing and was directed by the Chinese government, as the court of appeals found.

Similarly, there is no reason to consider the World Trade Organization (WTO) statements cited by the district court (Br. of U.S. at 10), for they did not involve construction of the specific regulations at issue. The statements did not occur in the context of a formal interpretation of the 1997 Notice or 2002 Notice. Most importantly, as the Chinese government has explained, representations as to "export administration" before the WTO only meant that quotas were no longer imposed and that special licenses were no longer required. It did not mean that the government was out of all regulation of export-related activity, and there is nothing to suggest otherwise. Br. for *Amicus Curiae* Ministry of Commerce of the People's Republic of China in Support of Defendants-Appellants at 27-28, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Apr. 14, 2014), ECF No. 105 (citing WTO, Council for Trade in Goods, *Transitional Review Under Article 18 of the Protocol of Accession of the People's Republic of China*, G/C/W/438, at 2-3, ¶5(a) (Nov. 20, 2002), *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/65661/Q/G/C/W438.pdf and WTO, Trade Policy Review Body, *China Trade Policy Review 2006*, WT/TPR/S/161, at 104 ¶141 & n.120 (Feb. 28, 2006), *available at* https://docs.wto.org/dol2fe/Pages/FE_Search/ExportFile.aspx?Id=68101&filename=Q/WT/TPR/S161-3.pdf). Indeed, the United States has affirmed the same interpretation of the Chinese export regime before the WTO as that adopted by the Second Circuit here. *See* WTO, Opening Oral Statement of the Complainants at the First Substantive Meeting of the Panel with the Parties, *China—Measures Related to the Exportation*

of Various Raw Materials, WT/DS394/R, WT/DS395/R, WT/DS398/R, ¶31 (Aug. 31, 2010) (arguing that China maintained "a system that prevents exportation unless the seller meets or exceeds the minimum export price."), *available at* https://ustr.gov/sites/default/files/uploads/ziptest/WTO%20Dispute/New_Folder/Pending/Jt.Oral1_.as%20delivered.fin_.(pdf%20version).pdf.

6. Further, the Second Circuit's deference standard does in fact conform to the deference standard of the WTO and other international bodies. *Cf.* Br. of U.S. at 11-12. The WTO has held that "any [WTO] Member can reasonably expect that considerable deference be given to its views on the meaning of its own law." *See* WTO, Panel Report, *United States – Sections 301-310 of the Trade Act of 1974*, WT/DS152/R, ¶7.19 (Dec. 22, 1999), *available at* https://www.wto.org/english/tratop_e/dispu_e/wtds152r.pdf.

While this does not mean that *any* proffered interpretation is binding on the WTO (*id.*), it is hard to see how that standard would be inconsistent with an expectation that a formal representation supported by a sworn proffer and reasonable under the circumstances would receive conclusive deference. *See* Pet. App. 25a-26a ("If deference by any measure is to mean anything, it must mean that a U.S. court not embark on a challenge to a foreign government's official representation to the court regarding its laws or regulations, even if that representation is inconsistent with how those laws might be interpreted under the principles of our legal system."). And indeed the U.S. has requested that the WTO afford its statements "considerable deference" when it has made a formal interpretation of its own law to that body. *See* WTO, Second Written Submission of

the United States of America, *United States – Section 129(c)(1) of the Uruguay Round Agreements Act*, WT/DS221, ¶11 (Mar. 8, 2002), *available at* https://ustr.gov/sites/default/files/uploads/Countries%20Regions/africa/agreements/pdfs/dispute_settlement/ds221/asset_upload_file327_6455.pdf.[2]

7. The Second Circuit's holding aligns with the substantive views on deference articulated by the United States as well as international standards, and the only way the United States comes to the view that the holding is in error is by giving it a much broader reading than the opinion below will bear. This Court should therefore decline to review this case, for it does not actually raise the concerns claimed by the United States.

II. THE CASES CITED BY THE UNITED STATES DO NOT CONFLICT WITH THE HOLDING BELOW

1. The United States cites three cases purportedly in conflict with the decision below. Br. of U.S. at 12-13. All three were addressed in Respondent's brief in opposition (BIO at 20-22 & 23-24), so Respondents will only briefly address here why they do not conflict with the decision below.

2. The first is *In re Oil Spill by the Amoco Cadiz Off the Coast of France on March 16, 1978*, 954 F.2d 1279 (7th Cir. 1992). In that case, the Seventh Circuit deferred to the French government's interpretation of its own law. *Id.* at 1312-13. The court actually stated that the appearance of the French government made it unnecessary for the court

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[2] The United States' footnote citations to treaties to which it is not a party are therefore not persuasive. Br. of U.S. at 12 n.2.

to assess whether the interpretation favored by the French State was correct. *Id.* at 1312 ("If all of the litigants were private parties, we would need to decide whether this understanding of the law is correct."). And it expressly analogized its deference to the deference accorded to U.S. administrative agencies that, as noted above, is functionally identical to the standard of deference articulated by the Second Circuit in this case. *See id.* ("Giving the conclusions of a sovereign nation less respect than those of an administrative agency is unacceptable."); *see also supra* at 2.

2. *United States v. McNab*, 331 F.3d 1228 (11th Cir. 2003), likewise does not conflict with the Second Circuit's holding below. In that case, the Honduran government made a formal representation as to the validity of its laws during the pre-trial stages of a criminal litigation, but then completely reversed its position after the defendants had been convicted. *Id.* at 1241-42. Faced with that highly unusual circumstance, and with finality concerns firmly in mind, the Eleventh Circuit declined to unsettle a judgment premised on the Honduran government's original representation. By contrast, in this case, the Chinese government's position has remained consistent from the time of the motion to dismiss to the time of appellate review, and the United States identifies no contradictory construction of the specific regulations at issue in this case that would justify denial of deference.

3. Finally, the United States cites *McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101 (D.C. Cir. 2001). In that case, Iran's arguments regarding the impact of its corporate law conflicted with its own representations as to the content of the law. *Id.* at 1108-09. That quite obviously made Iran's

claims unreasonable under the circumstances on the basis of its own proffer. Thus, the passage in *McKesson* cited by the United States does not even conflict with a broad reading of the Second Circuit's holding below, let alone the narrow holding the court actually articulated.

4. Aside from the United States' contention regarding the purported circuit conflict, the United States offers no compelling reason for further review by this Court. Since all of the cases cited by the United States are clearly reconcilable, this case does not merit review by this Court.

III. ACCEPTING THE UNITED STATES' POSITION WOULD NOT ALTER THE OUTCOME OF THE CASE

1. Notably absent from the United States' brief is any indication as to how modifying the Second Circuit's reasoning in the way the United States advocates would actually alter the ultimate outcome in this case. In fact, the United States never actually claims the district court's judgment should have been affirmed or that international comity abstention should not have resulted in dismissal of Petitioners' claims.

2. This omission is quite understandable. As Petitioners observed in their Second Circuit briefing, "Chinese law . . . required the Chamber and its Subcommittee to actively coordinate to set vitamin C export prices and quantities." Final Form Brief for Plaintiffs-Appellees, at 25, *In re Vitamin C Antitrust Litig.*, No. 13-4791 (2d Cir. Aug. 11, 2014), ECF No. 174 (citation and internal marks omitted). Under this Court's holdings in *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), and multiple other cases, that amounts to a concession that Chinese law

required Respondents to violate the Sherman Act. *See* BIO at 17-19.

The sole question at issue for comity purposes before this Court is whether Chinese law conflicted with U.S. law. It is undisputed for purposes of this Court's review that every other comity factor favors dismissal, Br. of U.S. at 20, leaving conflict the only issue to be resolved. As the conflict between U.S. and Chinese law is beyond dispute for the reasons just given, even a modification of the Second Circuit's reasoning by this Court could not possibly result in anything but affirmance of the Second Circuit's core holding that Chinese law mandated conduct that U.S. law prohibited, making dismissal on comity grounds appropriate. There is thus no reason to believe that tweaking the articulation of the legal standard or altering its application as proposed in the United States' brief would actually result in a different judgment.

CONCLUSION

For the foregoing additional reasons, the petition for a writ of *certiorari* should be denied.

Respectfully Submitted,

JONATHAN M. JACOBSON
Counsel of Record
DANIEL P. WEICK
JUSTIN A. COHEN
WILSON SONSINI GOODRICH
& ROSATI, P.C.
1301 Avenue of the
Americas, 40th Floor
New York, New York 10019
(212) 497-7700
jjacobson@wsgr.com

SCOTT A. SHER
BRADLEY T. TENNIS
WILSON SONSINI GOODRICH
& ROSATI, P.C.
1700 K Street, N.W.,
Fifth Floor
Washington, D.C. 20006
(202) 973-8800

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Attorneys for Respondents